NKM PROPERTIES SDN. BHD.

v.

RAKYAT FIRST MERCHANT BANKERS BHD.

SUPREME COURT, KUALA LUMPUR
EUSOFF CHIN SCJ
MOHD. JEMURI SERJAN CJ
MOHD. YUSOFF MOHAMED SCJ
[CIVIL APPEAL NO. 03-39-91]
27 MAY 1992

LAND LAW: *Public Auction - Land charged to respondent bank - Court ordered land to be sold by public auction - Whether reserve price for subsequent auction can be fixed higher than the reserve price of the last unsuccessful auction sale - National Land Code 1965 s. 259(2)(c)*

On 7 December 1982 the High Court had ordered that the land being the subject matter which was charged to the respondent be sold by public auction under the National Land Code. Subsequent thereto, eight auctions were held on several dates and at reserve prices as follows:

Dates	**Reserve price** (in Million)
4 September 1987	RM8.25
13 January 1988	RM7.4
5 April 1988	RM6.6
17 October 1988	RM6.0
4 July 1989	RM5.7
30 November 1989	RM5.3
23 November 1989	RM4.8755
12 June 1990	RM4.63

All these auctions were not successful because there were no bidders.

The respondent took a summons for directions for the SAR to fix a new reserve price and the next date of auction sale. The respondent produced a valuation report which showed the estimated open market value of the land to be RM5,700,000 and estimated forced sale value to be RM4,020,000.

On 18 January 1991 the SAR who heard the application fixed the reserve price at RM5,000,000. The appellant appealed to the Judge in chambers who on 20 March 1991 confirmed the SAR's order. The learned Judge then issued a certificate under O. 56 r. 2(2) of the Rules of the High Court that he did not wish to hear further arguments in open Court. Hence this appeal to the Supreme Court by the appellant. The respondent filed a notice of cross appeal.

The main issue was the interpretation of s. 259(2)(c) of the National Land Code, namely, whether the reserve price for the subsequent auction, can be fixed higher than the reserve price of the last unsuccessful auction sale which took place on 12 June 1990. The appellant's Counsel contended that the SAR should have fixed the reserve price at RM5.7 million because that was the estimated open market value of the land. On the other hand, the Counsel for the respondent argued that since there was no bidder at the last auction sale at the reserve price of even RM4.6 million the figure for the forced sale value at RM4,020,000 should be taken.

Held:

[1] Section 259(2)(c) of the National Land Code which is expressed in clear language states that "in the absence of any bid at or above the reserve price" the Registrar shall withdraw the land from the sale, and direct that the land be put up for auction at a subsequent date "**either at the same or at a reduced reserve price**". The 'same' reserve price referred to is the reserve price at the latest sale at which there had been no bidder, which means that if there happens to be the tenth auction at which there had been no bidder, then the word 'same' refers to the reserve price at the tenth auction.

[2]Based on the requirements of s. 259(2)(c) of the National Land Code, the Senior Asst. Registrar is not authorised to fix the reserve price above the reserve price for the last auction which was unsuccessful.

[3]Since the reserve price for the last unsuccessful auction was RM4.63 million, and following the requirements of s. 259(2)(c) of the National Land Code as aforesaid, the reserve of the land at the next auction should be fixed at RM4.63 million.

[4]For the reasons given above, the learned Judge in confirming the order of the Senior Asst. Registrar, had failed to construe s. 259(2)(c) of the National Land Code correctly.

[Both appeal and cross appeal allowed. No order as to costs. Deposit of RM500 to be returned to appellant.]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG TANAH: *Lelongan awam - Tanah dicagarkan kepada responden bank - Mahkamah perintahkan tanah dijual melalui lelongan awam - Sama ada harga rizab bagi lelongan berikutnya boleh ditetapkan lebih tinggi daripada harga rizab di lelongan terakhir yang tidak berjaya itu - Kanun Tanah Negara 1965 s. 259(2)(c)*

Pada 7 Disember 1982 Mahkamah Tinggi telah memerintahkan supaya tanah yang menjadi hal perkara yang dicagarkan kepada responden dijual melalui lelongan awam di bawah Kanun Tanah Negara. Berikutan dengan itu, lapan lelongan telah diadakan pada beberapa tarikh dan pada harga rizab seperti berikut:

Tarikh	**Harga Rizab** (dalam juta)
4 Sept 1987	RM8.25
13 Jan 1988	RM7.4
5 April 1988	RM6.6
17 Okt 1988	RM6.0
4 Julai 1989	RM5.7
30 Nov 1989	RM5.3
23 Nov 1990	RM4.8755
12 Jun 1990	RM4.63

Kesemua lelongan ini tidak berjaya kerana tidak ada penawar-beli.

Responden mengambil suatu saman minta arahan bagi PKP menetapkan suatu harga rizab yang baru dan tarikh jualan lelong yang berikutnya. Responden mengemukakan suatu laporan penilaian yang menunjukkan nilai pasaran terbuka tanah tersebut ditaksirkan pada RM5,7000,000 dan taksiran nilai jualan terpaksa sebagai RM4,020,000.

Pada 18 Januari 1991 PKP telah mendengar permohonan tersebut dan menetapkan harga rizab pada RM5,000,000. Perayu membuat rayuan kepada Hakim dalam kamar dan pada 20 Mac 1991 Hakim berkenaan mengesahkan perintah PKP Hakim yang arif itu kemudiannya mengeluarkan suatu Sijil Perakuan di bawah Aturan 56 kaedah 2(2) Kaedah-Kaedah Mahkamah Tinggi bahawa beliau tidak berhasrat untuk mendengar apa-apa penghujahan yang selanjutnya dalam Mahkamah terbuka. Maka, kerana itulah rayuan ini dibuat kepada Mahkamah Agung oleh perayu dan responden memfailkan suatu notis rayuan balas.

Isu utama ialah pentafsiran s. 259(2)(c) Kanun Tanah Negara, iaitu, sama ada harga rizab bagi lelongan berikutnya boleh ditetapkan lebih tinggi daripada harga rizab terakhir yang tidak berjaya yang diadakan pada 12 Jun 1990. Peguam perayu menghujahkan bahawa PKP sepatutnya menetapkan harga rizab pada RM5.7 juta kerana itulah nilai pasaran terbuka tanah tersebut yang ditaksirkan. Sebaliknya, Peguam responden menghujahkan bahawa oleh kerana tidak ada penawar-beli di jualan lelong yang terakhir walaupun pada harga rizab RM4.6 juta, maka angka untuk nilai jualan terpaksa pada RM4,020,000 haruslah diambil.

Diputuskan:

[1] Seksyen 259(2)(c) Kanun Tanah Negara yang jelas mentakrifkan bahawa "apabila tiada sebarang tawaran beli pada atau melebihi harga rizab", Pendaftar hendaklah menarik balik tanah tersebut daripada dijual, dan mengarahkan supaya tanah itu diletakkan untuk lelongan pada suatu tarikh yang kemudian "sama ada pada harga rizab yang sama atau pada harga rizab yang berkurangan." Harga rizab yang "sama" yang dirujukkan itu ialah harga rizab pada jualan yang terakhir dimana tidak ada penawar-beli. Ini bermakna bahawa sekiranya terdapat lelongan kesepuluh dimana tidak ada penawar beli, maka perkataan "sama" merujuk kepada harga rizab di lelongan kesepuluh itu.

[2] Berdasarkan kepada kehendak s. 259(2)(c) Kanun Tanah Negara, PKP tidak diberi kuasa untuk menetapkan harga rizab melebihi harga rizab pada lelongan terakhir yang tidak berjaya.

[3] Memandangkan harga rizab bagi lelongan terakhir yang tidak berjaya ialah RM4.63 juta dan mengikut kehendak s. 259(2)(c) Kanun Tanah Negara sebagaimana yan tersebut di atas, harga rizab tanah tersebut pada lelongan yang berikutnya haruslah ditetapkan pada RM4.63 juta.

[4] Atas sebab-sebab yang diberikan di atas, Hakim Yang Arif dalam mengesahkan perintah Penolong Kanan Pendaftar telah gagal untuk mentafsirkan s. 259(2)(c) Kanun Tanah Negara dengan betul.

[Kedua-dua rayuan dan rayuan balas dibenarkan. Tiada perintah mengenai kos. Deposit berjumlah RM500 hendaklah dikembalikan semula kepada perayu.]

Case referred to:

Pacific Bank Bhd. v. Wong Kum Meng [1990] 1 CLJ (Rep) 447 ***(cit)***

Legislation referred to:

Federal Constitution, art. 132(3)(c)
National Land Code 1965, ss. 256, 257(1)(d), 258, 259(1), 259(2), 259(2)(c)
Rules of the High Court 1980, O. 56 r. 2(2)

For the appellant - M.S. Murthi; M/s. Murthi & Partners
For the respondent - Benjamin John Dawson; M/s. Nik Hussain & Partners

JUDGMENT

Eusoff Chin SCJ:

On 7 December 1982 the High Court had ordered that the land held under C.T. No. 1478, Lots 499 and 656 Mukim of Seremban which was charged to the respondent be sold by public auction under the National Land Code. Subsequent thereto, eight auctions were held on dates and at reserve prices as follows:

Dates	**Reserve price** (in million)
4 September 1987	RM8.25
13 January 1988	RM7.4
5 April 1988	RM6.6
17 October 1988	RM6.0
4 July 1989	RM5.7
30 November 1989	RM5.3
23 November 1990	RM4.8755
12 June 1990	RM4.63

These auctions were not successful because there were no bidders.

The respondent took out a summons for direction for the Senior Assistant Registrar (SAR) to fix a new reserve price and the next date of auction sale. The respondent produced a valuation report dated 12 September 1990 prepared by a licensed land valuer which showed the estimated open market value of the land to be RM5,700,000 and the estimated forced sale value to be RM4,020,000.

On 18 January 1991 the SAR heard the application and fixed the reserve price at RM5,000,000. The appellant appealed to the Judge in chambers who on 20 March 1991 confirmed the SAR's order. The learned Judge then issued a certificate under O. 56 r. 2(2) of the Rules of the High Court that he did not wish to hear further arguments in open Court. The appellant appealed to the Supreme Court, and the respondent filed a notice of cross appeal.

Both the learned Counsels before the Supreme Court agreed that the main issue is the interpretation of s. 259(2)(c) of the National Land Code, (hereinafter referred to as the Code) namely whether the reserve price for the subsequent auction, can be fixed higher than the reserve price of the last unsuccessful auction sale which took place on 12 June 1990.

It was contended by the appellant's learned Counsel that the SAR should have fixed the reserve price at RM5.7 million because that is the estimated open market value of the land. On the other hand the learned Counsel for the respondent was of the view that since there was no bidder at the last auction sale at the reserve price of even RM4.6 million, the figure for the forced sale value of RM4,020,000 should be taken.

Section 259(1) and (2) of the Code states:

259 Procedure at Sale

(1) Every sale pursuant to an order under s. 256 shall take place under the direction of an officer of the Court, but this sub-section shall not prevent the Court from taking the assistance thereat of any licensed auctioneer.

(2) The officer under whose direction the sale takes place shall:

(a) receive the bids (including any bid by or on behalf of the chargee);

(b) settle summarily any question arising in the course of the proceedings;

(c) in the absence of any bid at or above the reserve price, withdraw the land or lease in question from the sale, direct that it be put up for auction on a subsequent date, **either at the same or at a reduced reserve price,** and see that the subsequent sale is publicly advertised in the like manner; and

(d) subject to para. (c), declare the sale concluded in favour of the highest bidder.

(Emphasis supplied)

We note that the order of sale of land made by the Court under s. 256 of the Code must, under s. 257(1)(d) of the Code, "require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in a question". Section 258 of the Code imposes a duty on the Registrar of the Court to see to it that everything that needs to be done before the auction sale takes place is properly done. It is argued by the learned Counsel for the appellant that at the auction sale the Registrar is not physically present, but that the sale is conducted by a Bailiff of the Court assisted by a licenced auctioneer. He is not certain whether it is the Bailiff who is "the officer under whose direction the sale takes place". Having perused the relevant provisions under the Code we are of the view that the SAR is the officer under whose direction the sale takes place, and the Bailiff being the junior officer though physically present at the sale, acts under the directions of the Registrar. The officer under whose direction the sale takes place cannot be the Judge because a Judge is not an officer under Article 132(3)(c) of the Federal Constitution. Though the Bailiff may conduct the auction sale with the assistance of a licenced auctioneer, if any question arises at the sale, the Bailiff has to refer the question to the SAR for decision. It sometimes happens that for convenience of parties and bidders, a sale is conducted at the land office in whose district or sub-district the land is situated. In such case, if a question arises at the sale, the Bailiff may communicate with the SAR by telephone.

The question before us concerns the meaning of the words "either at the same or at a reduced reserve price".

The learned Counsel for the appellant brought to our attention the decision of N.H. Chan (J) in K.L. O/S. No. S5-31-837-87. There, the land was to be put up for auction for the third time. The new valuation report for this third sale stated that the current market price was RM210,000. At the second auction sale the reserve price was RM220,000. The SAR fixed RM178,000 as the reserve price for the third auction sale. The Judge decided that "the Registrar cannot unilaterally reduce the reserve price without paying regard to the market value. If the market value is reduced by the onslaught of recession, then the Registrar can reduce the reserve price to one which is equal to the current market value".

In *Pacific Bank Bhd. v. Wong Kum Meng* [1990] 1 CLJ (Rep) 447, the land had been put up for auction three times at a reserve price of RM400,000, RM350,000, and RM300,000 respectively. There were no bidders. The SAR fixed RM300,000 as reserve price for the fourth auction but the defendant appealed to the Judge to increase the reserve price to RM350,000. Abdul Razak (J) holding that the words 'same reserve price' could refer to any of the reserve prices at the earlier sales, fixed the reserve price at RM350,000 for the fourth auction. He was of the view that the market value of a particular land dictates the fixing of the reserve price at subsequent auction sales, but that the reserve price at the subsequent sales cannot be above the reserve price fixed for the first auction sale.

It is necessary to determine the meaning of 'reserve price'. Section 257(1)(d) of the Code provides that the reserve price is a price equal to the estimated market value of the land in question. Market value means the price which a willing vendor may reasonably expect to obtain from a willing purchaser. The SAR is not an expert in land valuing, and he has to study the land valuation reports put before him. He may face great difficulty when the estimated market values of the land in the valuation reports put by the plaintiff and by the defendant differ greatly. In that case he has to scrutinise the reports carefully. If, one report contains, as comparison, a schedule of recent sales of lands of similar character and land-use in the vicinity of the land to be sold, and the other report does not, he may choose to accept the first report as the correct guide. But he has to exercise his discretion in fixing the reserve price judiciously which means that he has to hear the parties, and take into consideration all matters which are relevant. In fixing the reserve price for the first auction sale under s. 257(1)(d) of the Code he should not take the 'forced sale value' of the land as the estimated market price because 'forced sale value' takes into account an element of compulsion to sell or to buy.

Section 259(2)(c) of the Code is expressed in clear language. It states that "in the absence of any bid at or above the reserve price" the Registrar shall withdraw the land from the sale, and direct that the land be put up for auction at a subsequent date "**either at the same or at a reduced reserve price**" (emphasis supplied). We are of the view that the 'same' reserve price referred to here, is the reserve price at the latest sale at which there had been no bidder. If that happens to be the tenth auction at which there had been no bidder, then the word 'same' refers to the reserve price at the tenth auction. The word 'same' cannot relate to the first to the ninth auctions which had been unsuccessful. Parliament, in legislating this provision, must have been aware of the futility of increasing the reserve price above that of the latest auction at which there was no bidder. At an auction sale the bid must start at or above the reserve price. It is logical, therefore, that the reserve price at the subsequent auction should either be at the same reserve price as the last unsuccessful auction, or at a reduced reserve price. It may be true that when the next auction date is fixed after a long lapse of time, the market value of the land may have increased to beyond the reserve price fixed at the last auction. If that is so, the law requires that the reserve price fixed for the next auction cannot be above the reserve price fixed for the last auction. It is then left to the bidders to push the price up when they make their bids. It must be borne in mind that where the language of the law is clear, the duty of the Court is to interpret what the law is, and not what it should be.

In this case, the reserve price at the last auction was RM4.63 million. When considering the reserve price of the land for the next auction, the SAR was faced with a valuation report which states that the market value of the land is RM5.7 million, and the 'forced sale value' is at RM4.02 million. But the SAR had fixed it at RM5 million, and the learned Judge had confirmed this reserve price, but gave no reasons for doing so.

Following the requirements of s. 259(2)(c) of the Code, the SAR is not authorised to fix the reserve price above the reserve price for the last auction which was unsuccessful. The reserve price for the next auction should not be higher than RM4.63 million.

In this appeal and cross appeal, both the learned Counsels had alleged that the learned Judge had not complied with the provisions of s. 259(2)(c) of the Code with which we agree. Since the reserve price for the last unsuccessful auction was RM4.63 million, and in the light of the view we have taken of the proper construction of s. 259(2)(c) of the Code we are of the view that following the requirements of this Section the reserve price of the land at the next auction should be fixed at RM4.63 million.

For the reasons given above, we find that the learned Judge in confirming the SAR's order, had failed to construe s. 259(2)(c) of the Code correctly. We, therefore, allow both the appeal and the cross appeal, but we make no order as to costs. The deposit of RM500 is to be returned to the appellant.

Also found at [1992] 3 CLJ 1680